

(27,321)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 566.

THE CITY OF NEW YORK, APPELLANT,

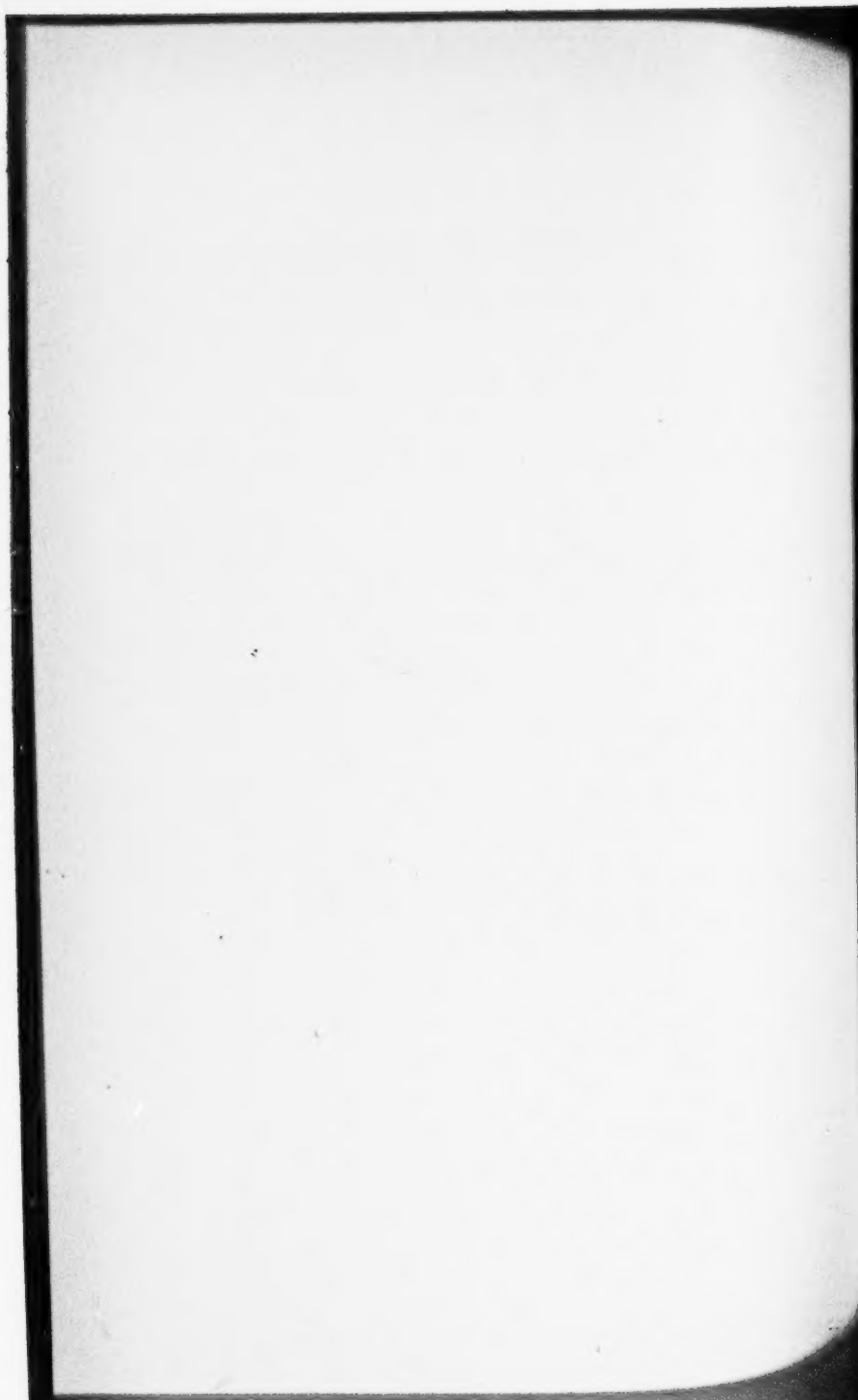
vs.

THE CONSOLIDATED GAS COMPANY OF NEW YORK
ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

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United States Circuit Court of Appeals for the Second District.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Appellee,
against

CHARLES D. NEWTON, as Attorney General of the State of New York;
EDWARD SWANN, as District Attorney of the County of New York,
State of New York, and LEWIS NIXON, Constituting the Public
Service Commission of the State of New York, First District, De-
fendants-Appellees; THE CITY OF NEW YORK, Appellant.

Transcript of Record.

[Stamped:] United States Circuit Court of Appeals, Second Cir-
cuit. Filed June 7, 1919. William Parkin, Clerk.

Order to Show Cause.

District Court of the United States, Southern District of New York.

[In Equity. No. 15—358.]

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against

CHARLES D. NEWTON, as Attorney General of the State of New
York; EDWARD SWANN, as District Attorney of the County of New
York State of New York, and TRAVIS H. WHITNEY, CHARLES S.
HERVEY, and FREDERICK J. H. KRACKE, Constituting the Public
Service Commission of the State of New York, First District, De-
fendants.

Upon reading and filing the petition of The City of New York,
dated and verified the 29th day of January, 1919, and the bill
of complaint in the above entitled action, verified January 16, 1919,
annexed thereto, from which it appears that The City of New York
claims an interest in the above entitled litigation.

Now, on motion of Wm. P. Burr, Esq., Corporation Counsel of
The City of New York, it is

Ordered that the Consolidated Gas Company of New York,
Charles D. Newton, as Attorney General of the State of New
York, Edward Swann, as District Attorney of the County of New
York, State of New York, Travis H. Whitney, Charles S. Hervey
and Frederick J. H. Kracke, constituting the Public Service Com-
mission of the State of New York, First District, show cause before
this Court, at a stated Term thereof, to be held in Room 235 in the
Post Office Building, in the Borough of Manhattan, in the City of

New York, on Friday, the 31st day of January, 1919, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why this Court should not make an order herein joining The City of New York as a party defendant in the above entitled action; and

Why The City of New York, the petitioner herein, should not have such other and further relief as to this Court may seem just and proper; and it is

Further ordered that service of a copy of this order and the petition upon which it is granted (except the printed bill of complaint, which is already on file with the Clerk of this Court and with the parties named as defendants herein), upon the said parties on or before the 29th day of January, 1919, shall be deemed sufficient.

Dated, New York, January 29, 1919.

JULIUS M. MAYER,
United States District Judge.

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Petition of The City of New York.

District Court of the United States, Southern District of New York.

[In Equity.]

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against

CHARLES D. NEWTON, as Attorney General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Travis H. Whitney, Charles S. Hervey, and Frederick J. H. Kracke, Constituting the Public Service Commission of the State of New York, First District, Defendants.

To the Honorable Judge of the District Court of the United States for the Southern District of New York.

The petition of The City of New York, made through William P. Burr, Corporation Counsel, shows as follows upon information and belief:

I. Your petitioner, The City of New York, is a domestic municipal corporation organized and existing under and pursuant to the authority of Chapter 378 of the Laws of 1897 of the State of New York as amended by Chapter 466 of the Laws of 1907 wherein and whereby it became the successor corporation of certain domestic municipal public corporations theretofore existing under and pursuant to ancient charters and acts of the Legislature

II. The Consolidated Gas Company of New York, the complainant in the above entitled suit, is a corporation organized and existing under the laws of the State of New York.

III. The above entitled action was commenced in the District Court of the United States for the Southern District of New York by the filing of a bill of complaint in the office of the Clerk of said court and by the issuing of a subpoena ad respondendum on the 16th day of January, 1919; a copy of the said bill of complaint is hereto attached, made part hereof and marked Exhibit "A."

The object of this action is to have declared unconstitutional, null and void Chapter 125 of the Laws of 1906 providing for a rate for gas within certain portions of the City of New York of 80 cents per one thousand cubic feet and the relief prayed for in said bill of complaint specifically reads as follows:

"1. That it be adjudged and decreed that said Chapter 125 of the Laws of 1906 is illegal and void, because in contravention of Section 10 of Article I and the Fourteenth Amendment of the Constitution of the United States, as aforesaid.

2. That it be adjudged and decreed that your orator has no adequate remedy at law for the injury which will result from the further enforcement of said Act and that such injury will be irreparable.

3. That it be adjudged and decreed that your orator be granted a writ of permanent injunction, issuing out of and under the seal of this Honorable Court, against the defendants, restraining them and each of them and each of their officers, agents, servants and employees and any and every person acting under and by virtue of the authority of said Act, from in any way enforcing or attempting to enforce the provisions of said Act of 1906 against your orator, or from bringing any actions thereunder to enforce the said penalties against your orator, or from bringing any actions in mandamus or for an injunction in any court whatsoever, for the purpose of compelling compliance by your orator with said Act."

IV. It appears from paragraph "VI" of said bill of complaint that the complainant herein exhibited in the Circuit Court of the United States for the Southern District of New York a bill of complaint in an action in which The City of New York was named as a necessary and proper party defendant together with the Attorney General of the State of New York, the District Attorney of New York County and the New York State Commission of Gas and Electricity which were named as co-defendants with The City of New York and in said bill relief similar to that sought for in the bill filed in the above entitled action was prayed for and the defendants named in said bill of complaint were duly served with process, appeared and filed answers and said cause of action was duly heard and thereafter on April 3, 1908 there was filed in said court a final decree adjudging that the complainant, the Consolidated Gas Company of New York, was entitled to the relief prayed for and granting writ of permanent injunction prayed for in said bill of complaint.

Thereafter an appeal from said decree was duly taken by The City of New York, your petitioner, and the other defendants named

in said cause of action to the Supreme Court of the United States and said decree was by that court reversed and the cause of action remanded to the said Circuit Court with directions to dismiss the bill of complaint without prejudice and that on or about February 13, 1909, a decree was duly entered in said court dismissing said bill of complaint without prejudice.

V. In the present bill of complaint filed in the above entitled action The City of New York has not been joined as a party defendant. Charles D. Newton as Attorney General of the State of New York has been made a party and also Edward Swann as District Attorney of the County of New York of the State of New York for the reason that it would be the duty of those officials to prosecute the complainant criminally for each and every violation of Chapter 125 of the Laws of 1906 and force and collect the penalties prescribed by said statute and the defendants Travis H. Whitney, Charles S. Hervey and Frederick J. H. Kracke as members of the Public Service Commission for the First District have been made parties to said cause of action for the reason that it is provided by Section 74 of the Public Service Commissions Law that whenever the said Commission shall be of opinion that a gas company was failing
7 or omitting to do anything required by law or is doing anything contrary to or in violation of law the said Commission shall direct their counsel to begin proceedings in the Supreme Court of the State of New York to have such action prevented by injunction or mandamus.

VI. It is alleged in paragraph "XVIII" of the complaint herein that the complainant has more than 498,650 customers in the City and County of New York to whom it is daily selling and distributing gas and that the amount of gas so sold and distributed during the year ending October 31, 1918, was 17,592,959,800 cubic feet and that many of said customers are financially irresponsible and only temporary residents of the City of New York.

These 498,650 individual customers were not made parties to the above entitled action and were not served with any process of this court and are, therefore, not before this Court.

Your petitioner, The City of New York, embraces both the territory in which the Consolidated Gas Company of New York, the complainant herein, operates, and also the population of said territory of which said large number of consumers is a component part. In the Court of Appeals of the State of New York, in *Interborough Railway Co. v. William S. Rann*, as Corporation Counsel of the City of Buffalo, reported in *New York Law Journal*, July 26, 1918, laid down the proposition that common rights of the inhabitants of the city are the rights of the city and in language as follows:

8 " * * a municipal corporation consists, however, of both territory and inhabitants. As a legal conception, the corporation is an entity distinct from its inhabitants, but it remains a local community, a body of persons, the sum tot

of its inhabitants and the proper custodian and guardian of their collective rights. 'Every municipal corporation has a two-fold character, the one governmental, the other private' (19 R. C. L., 697). In its governmental capacity it may command, in its private character, as a collection of individuals, it must sometimes barter and bargain * * *. By the use of 'a convenient fiction' (People v. North River S. R. Co., 121 N. Y., 582, 622), it may be plausibly pressed that such rights are not the rights of the City of Buffalo, but if we look at the substance of things we must conclude that the common rights of the inhabitants of the city, secured through the agency of the city officials, are rights of the city * * *."

The complainant herein, the Consolidated Gas Company of New York, uses the streets of The City of New York, the petitioner herein, and enjoys the protection of its fire, police, water and other departments and The City of New York levies taxes upon the complainant under provisions of law and from many points of view of municipal administration is interested in the complainant herein and its operation.

VII. Section 255 of the Greater New York Charter, as amended by Chapter 466 of the Laws of 1901, and Chapter 602 of the Laws of 1917, provides in part:

"* * * The corporation counsel, except as otherwise herein provided, shall have the right to institute actions in law or equity, and any proceedings provided by the code of civil procedure or by law, in any court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or of any part or portion thereof, or of the people thereof, or to collect any money, debts, fines or penalties or to enforce the laws and ordinances * * *."

Chapter 125 of the Laws of 1906 is a local and city bill and affects solely the inhabitants of The City of New York and particularly the 498,660 customers of the complainant mentioned in paragraph XVIII of complainant's bill and the power and responsibility of representing such inhabitants of The City of New York and customers of the complainant in the litigation commenced by the filing of said bill to have said Chapter 125 of the Laws of 1906 declared unconstitutional has been imposed by said Section 255 of the Greater New York Charter, as amended, on the Corporation Counsel.

Such duty and responsibility is almost imposed on the Corporation Counsel by Chapter 247 of the Laws of 1913, which amended the General City Law and is known as The Home Rule Bill.

This act grants to the City

"the power to regulate, manage and control its property and local affairs and is granted all the rights, privileges and jurisdiction necessary and proper for carrying such power into execution. No enumeration of powers in this or any other law shall operate to

10 restrict the meaning of this general grant of power or to execute other powers comprehended within this general grant."

Among the specific powers granted to the City by this act are the following:

"To maintain order, enforce the laws, protect property and preserve and care for the safety, health, comfort and general welfare of the inhabitants of the city and visitors thereto; and for any of said purposes to regulate and license occupations and businesses."

The term "general welfare," as used in the law just quoted, is defined in Section 21 of said law as follows:

"§21. Public or municipal purpose and general welfare defined. The terms 'public or municipal purpose' and 'general welfare,' as used in this article, shall each include the promotion of education, art, beauty, charity, amusement, recreation, health, safety, comfort and convenience, and all of the purposes enumerated in the last preceding section."

The price of gas and its supply or lack of supply for light, heat and power purposes is a matter of serious consideration to the inhabitants of The City of New York and affects their health, happiness, comfort and convenience

VIII. Section 71 of the Public Service Commissions Law, which is Chapter 48 of the Consolidated Laws, provides in part as follows:

11 "Upon the complaint in writing of the mayor of a city
 * * * in which a person or corporation is authorized to
 manufacture, sell or supply gas or electricity for heat, light or power
 * * * as to the illuminating power, purity, pressure or price of
 gas, * * * the proper commission shall investigate as to the
 cause for such complaint."

It appears from the above quoted portion of Section 71 of the Public Service Commissions Law that The City of New York would have the right to initiate a rate-making proceeding and it follows that if the City have the right to initiate a proceeding of that character, it surely must be conceded that the City would be a party interested in the subject of the action and would be entitled to intervene at any stage of an action brought to have a statutory rate declared unconstitutional.

IX. Chapter 736 of the Laws of 1905 fixed the rate for gas supplied to The City of New York at 75 cents per 100 cubic feet. In the litigation referred to in paragraph VI of the bill of complaint herein and entitled "Willecox vs. Consolidated Gas Co. of New York et al.", the validity of this act was sustained by the Supreme Court of the United States. (See 212 U. S. 19, 54). The United States Supreme Court in that case said:

"Lastly, it is objected that there is an illegal discrimination between the City and the consumers individually. We see no d

crimination which is illegal or for which good reasons could not be given. But neither the City nor the consumers are finding any fault with it, and the only interest of the complainant in the question is to find out whether by the reduced price to the City the complainant is upon the whole unable to realize a return sufficient to comply with what it has the right to demand. What we have already said applies to the facts now in question.

We cannot see from the whole evidence that the price fixed for gas supplied to the City by the wholesale, so to speak, would so reduce the profits from the total of the gas supplied as to thereby render such total profits insufficient as a return upon the property used by the complainant. So long as the total is enough to furnish such return it is not important that with relation to some customers that price is not enough."

In the said litigation entitled "Willecox vs. Consolidated Gas Company of New York, et al.", the complainant herein made a special attack on said Chapter 736 of the Laws of 1905 on the ground that the same was unduly preferential and discriminatory against the general consumers of gas in the City of New York. It is not unlikely that an attack may be made on said Chapter 736 of the Laws of 1905 by the complainant to establish that this price or rate of 75 cents per one thousand cubic feet to The City of New York requires a service from the Consolidated Gas Company, the complainant herein, without substantial compensation in addition to cost and thus affects the rate to all consumers. In such event it would be necessary for the City to introduce evidence of the special conditions under which gas is supplied to The City of New York and to show that the complainant herein, the Consolidated Gas Company of New York, is not required to furnish gas to The City of New York without substantial remuneration and that the service of the complainant to the City of New York is no ground or basis for holding or contending that the existing rate to consumers is unconstitutional and confiscatory.

X. The state courts have generally recognized the right of The City of New York to intervene in actions brought in equity to have statutes fixing a maximum rate declared unconstitutional on the ground that they do not allow a sufficient return on the capital invested. (*Quimby v. Public Service Commission*, 223 N. Y. 244; *Peo. etc. ex rel. Municipal Gas Company of City of Albany v. Public Service Commission*, decided July 12, 1918, reported in 224 N. Y. 156).

XI. Equity Rule XXXVIII of the Supreme Court of the United States, provides, in part, as follows:

* * * All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff * * *

Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to and in recognition of the propriety of the main proceeding."

The City of New York, your petitioner herein, respectfully submits that a complete determination of the controversy arising out of the above entitled litigation cannot be had without its presence as a party defendant and that it has an interest in the subject of said action which entitles it to an order permitting it to intervene in said litigation as a party defendant therein. The City of New York is the largest consumer of the gas furnished by the plaintiff company.

The City of New York, your petitioner, has no other means of protecting itself against any attack that may be made on the said 75 cent gas rate in said litigation than by and through intervention therein and that it could never obtain relief from a determination against the validity of said 75 cent statutory rate in said litigation unless it were permitted to intervene and protect itself therein.

XII. The bill of complaint herein was, on January 16, 1919, filed with the Clerk of this Court in printed form and copies thereof served on the Attorney General of the State of New York, the District Attorney of the County of New York and the Public Service Commission of the State of New York for the First District, and therefore your petitioner requests that in serving these papers service of the said printed bill of complaint be dispensed with.

No previous application has been made for the relief prayed for herein.

The reason why an order to show cause is asked instead of the usual five days' notice under Rule XIV of the general rules of practice of this court is that the time of the defendants to answer the complaint herein is about to expire and that a motion for an injunction may be made herein at any moment and your petitioner is anxious to be able to appear as a party defendant on the argument of any such motion and to be in a position to answer the complaint herein without delay.

Wherefore your petitioner respectfully prays for an order permitting it to intervene as a party defendant in the above entitled action.

Dated New York, January 29, 1919.

THE CITY OF NEW YORK,

Petitioner.

By WILLIAM P. BURR,

Corporation Counsel.

6 District Court of the United States, Southern District of New York.

[In Equity.]

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant
against

CHARLES D. NEWTON, as Attorney General of the State of New York;
EDWARD SWANN, as District Attorney of the County of New York,
State of New York, and TRAVIS H. WHITNEY, CHARLES S. HERVEY
and FREDERICK J. H. KRACKE, Constituting the Public Service
Commission of the State of New York, First District, Defendants.

STATE OF NEW YORK,
County of New York, ss:

William P. Burr, being duly sworn, says that he is the Corpora-
tion Counsel of the City of New York, and as such that he is an
officer of the petitioner herein. That the foregoing petition is true to
his knowledge except as to the matters therein stated to be alleged
upon information and belief, and as to those matters he be-
17 lieves it to be true. Deponent further says that the reason why
this verification is not made by the petitioner is that it is a
corporation; that the grounds of his belief as to all matters not
herein stated upon his knowledge are as follows: Information ob-
tained from the books and records of the Law Department, and other
departments of the city government, and from statements made to
him by certain officers or agents of the petitioner.

(Signed)

WILLIAM P. BURR.

Sworn to before me this 29th day of January, 1919.

(Signed)

MATTHEW F. DUFFY,
Notary Public, Kings Co., No. 138.

Bill of Complaint.

(EXHIBIT A ATTACHED TO PLAINTIFF'S PETITION.)

District Court of the United States, Southern District of New York.

[In Equity.]

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against

(CHARLES D. NEWTON, as Attorney General of the State of New York;
 EDWARD SWANN, as District Attorney of the County of New York,
 State of New York, and TRAVIS H. WHITNEY, CHARLES S. HERVEY
 and FREDERICK J. H. KRACKE, Constituting the Public Service
 Commission of the State of New York, First District, Defendants.

To the Honorable, the Judges of the District Court of the United
 States for the Southern District of New York.

The Consolidated Gas Company of New York, a corporation organized and existing under the laws of the State of New York, and having its principal place of business in the County of New York, Borough of Manhattan, City of New York, in the Southern
 19 District of New York, brings this its Bill of Complaint against Charles D. Newton, as Attorney General of the State of New York, Edward Swann, as District Attorney of the County of New York, State of New York, and Travis H. Whitney, Charles S. Hervey and Frederick J. H. Kracke, constituting the Public Service Commission of the State of New York, First District; and thereupon your orator alleges, upon information and belief, and complains:

I. Your orator is a corporation, duly incorporated for the purpose of manufacturing and selling gas in the City and County of New York, under and by virtue of a Consolidation Agreement duly executed on September 29, 1884, pursuant to a statute of the State of New York, entitled, "An Act to Authorize the Consolidation of Manufacturing Corporations," known as Chapter 367 of the Laws of 1884. The said Consolidation Agreement was executed by the New York Gas Light Company, The Manhattan Gas Light Company, The Metropolitan Gas Light Company of the City of New York, The Municipal Gas Light Company of New York, The Knickerbocker Gas Light Company and The Harlem Gas Light Company, all of which were corporations theretofore duly organized and existing under the laws of the State of New York, with the property, powers and franchises hereinafter referred to. The said Agreement was thereafter duly filed in the offices of the Secretary of State of the State of New York and of the Clerk of New York County, on November 10, 1884, pursuant to said statute. Your orator was duly organized as a corporation thereunder, to continue for fifty years, by virtue of the said

20 Consolidation Agreement and of the aforesaid statute; but, under the laws of New York, its corporate existence may, at any time, be extended, upon the consent of two-thirds in amount of the stockholders.

II. By virtue of the said Consolidation Agreement, your orator became the owner of various franchises or consents, duly obtained by its said predecessor companies, authorizing them to lay, maintain and operate mains, pipes and conductors in the streets, highways and public places of the City and County of New York; and it further became the owner of, and entitled to maintain and operate, mains, pipes and conductors theretofore laid in the various streets, highways and public places in the said City and County of New York by the said predecessor companies; and it also became thereby the owner of large and expensive works for the manufacture and distribution of gas, which had been erected by the said various predecessor companies. Your orator has, ever since, been engaged in the business of manufacturing and selling gas to the inhabitants of the said City and County of New York, and to the City of New York, and has maintained and operated the said mains, pipes and conductors in the said streets, highways and public places of the said City and County of New York, and has laid additional mains, pipes and conductors therein. Your orator is required by law, under penalty, to supply gas, upon application of the owner or occupant, to all buildings and premises within one hundred feet of any main laid by it and to furnish gas meters to its consumers without rent or charge.

III. The defendant, Charles D. Newton, is now the Attorney General of the State of New York, and resides in Geneseo, State of New York.

21 IV. The defendant, Edward Swann, is the District Attorney of the County of New York, State of New York, and resides in the Borough of Manhattan, City of New York.

V. The defendants, Travis H. Whitney, Charles S. Hervey and Frederick J. H. Kracke, constitute the Public Service Commission of the State of New York, for the First District, which includes the City of New York, and are now acting as such Commissioners, having been duly appointed under and by virtue of the provisions of Chapter 48 of the Consolidated Laws of the State of New York, prescribing their powers and providing for the regulation of certain public service corporations, including your orator. The said defendants are citizens of the State of New York and reside in the Borough of Brooklyn, City of New York.

VI. On May 1, 1906, your orator exhibited in the Circuit Court of the United States, for the Southern District of New York, its bill of complaint against Julius M. Mayer, as Attorney General of the State of New York, William Travers Jerome, as District Attorney of New York County, and Frederic E. Gunnison, John C. Davies and Lucian L. Shedden, constituting the New York State Commission of Gas and Electricity, and The City of New York, whereby your orator sought to have Chapters 736 and 737 of the Laws of 1905,

and Chapter 125 of the Laws of 1906 of the State of New York, and also a certain order of the Commission of Gas and Electricity of the State of New York, dated February 23, 1906, declared illegal and void, because in contravention of the Fourteenth Amendment to the Constitution of the United States and of Section 10 of Article 22 I of said Constitution; and your orator further prayed that writs of injunction might issue out of said Court, restraining each of the defendants from enforcing the said Acts and order against your orator, and for other and further relief, as in said bill of complaint more fully set forth.

VII. The defendants named in said bill of complaint were duly served with process and duly appeared and, respectively, filed answers in said cause. Thereafter, said cause was duly heard; and on April 3, 1908, there was filed in said Court a final decree, adjudging and decreeing that the complainant, your orator herein, was entitled to the relief prayed for, and granting the writs of permanent injunction prayed for in said bill of complaint.

VIII. Prior to the said final decree of the Circuit Court, William S. Jackson, successor to the said Julius M. Mayer, was duly substituted as a party defendant, as Attorney General of the State of New York; and William R. Willcox, William McCarroll, Edward M. Bassett, Milo R. Maltbie and John E. Eustis, constituting the Public Service Commission of the State of New York for the First District, were duly substituted as parties defendant for said Frederic E. Gunnison, John C. Davies and Lucian L. Shedden, constituting the New York State Commission of Gas and Electricity.

IX. Thereafter, an appeal from the said decree was duly taken to the Supreme Court of the United States by the defendants; and the said decree was by that Court reversed and the cause remanded to the said Circuit Court, with directions to dismiss the bill without prejudice; and pursuant to the mandate of the Supreme Court, the said cause was redocketed in said Circuit Court for the Southern District of New York; and on or about February 23 13, 1909, a decree was duly entered in said Court dismissing said bill of complaint without prejudice, in accordance with the opinion of the said Supreme Court.

X. The said decision of the Supreme Court was upon the ground that, although a return of less than six per cent. upon the value of its property would be confiscatory and although the finding of the lower Court, as modified by the Supreme Court, indicated that your orator would earn less than six per cent., yet the margin between possible confiscation and valid regulation was so close that it failed to show clearly and unmistakably that the rate of eighty cents per thousand cubic feet prescribed by said Act of 1906 would not afford your orator a fair and reasonable return upon the value of its property, especially in view of the fact that the said rate had never been in effect and the results upon the revenue of your orator under said rate were conjectural. The Supreme Court, in its said opinion (212 U. S., 19), recognized the constitutional right of your orator

to receive a return of at least six per cent. on the fair value of its property devoted to the public use, but said that it was desirable that there should be a practical test to determine the sufficiency or insufficiency of the return, and that if such test should show that your orator could not obtain a fair return under said rate, your orator should have the opportunity to again present its case to the Court; and to that end, the decree was reversed, with directions to dismiss the bill without prejudice.

24 XI. By said Chapter 125 of the Laws of 1906 of the State of New York, it is provided, that no corporation engaged in the business of manufacturing, furnishing or selling illuminating gas in the Borough of Manhattan, or in the Borough of The Bronx, in the City of New York, except in that portion thereof contained in the former towns of Eastchester and Pelham and in the former town of Westchester outside of the Villages of Wakefield and Williamsbridge, shall charge for gas manufactured, furnished or sold by it to the public a sum in excess of eighty cents per thousand cubic feet. The said Act provides that any corporation violating any provision thereof shall forfeit to the people of the State the sum of one thousand dollars for each offense.

XII. The value of your orator's property devoted to its gas business as of December 31, 1905, as found by the United States Circuit Court in the said former suit to review the said eighty cent law, as modified by the said decision of the Supreme Court of the United States, was \$55,612,435. There has since then been added thereto, property which has cost your orator not less than \$14,085,265, making the total value under normal conditions of your orator's property presently devoted to its gas business at least \$69,697,700; and the cost of reproducing said property at the present time would greatly exceed that amount. In addition thereto, your orator is possessed of going value and other intangible assets of great value, many of which were omitted from the valuation of your orator's property in said former suit in the United States Circuit Court, which have since been recognized by the Courts and State Commissions as reasonable and proper; and there now exists an aggregate deficiency in
25 your orator's earnings below six per cent., since the date the said eighty-cent rate was made effective, in the amount of at least \$12,000,000, which said sum should be added to the value of your orator's tangible property above stated, as going value, upon which your orator is entitled to a return.

XIII. During the year ending October 31, 1918, the gross operating revenues from your orator's gas business amounted to \$15,764,288.11, and the cost of manufacturing and distributing said gas, together with taxes and other operating expenses, amounted to \$15,665,046.46, leaving a net income from the business operation of your orator of only \$99,241.65, which is less than one-fourth of one per cent. on the value of your orator's investment, as hereinbefore set forth, and which represents a return of six per cent. upon a principal sum of only \$1,654,027.

The present value of your orator's investment, based upon the said eighty-cent gas case, exclusive of going value and other intangible property, is, as above stated, not less than \$69,397,700. The principal sum upon which a return of six per cent. is earned is, as above stated, \$1,654,027; and the minimum value of the property upon which your orator is deprived of any return by the said Act of 1906 is not less than \$68,043,673, while the maximum value thereof, based upon the present cost of reproduction of said property, is a much greater amount.

A return of only six per cent. upon the minimum value aforesaid of your orator's investment in its gas properties would amount to not less than \$4,181,862 per annum, or 23.29 cents per thousand cubic feet of gas sold. The said net earnings of \$99,261.65 for the year ending on October 31, 1918, amounted to only 55/100s of one cent per thousand cubic feet of gas sold. The deficiency in your orator's earnings during the said year below six per cent. on the minimum value of your orator's said investment amounted to \$4,082,620.35, or 22.74 cents per thousand cubic feet of gas sold; and this deficiency is caused directly and solely by the arbitrarily restricted price at which your orator is compelled by the State of New York to supply gas to your orator's customers.

Your orator's average daily sales during the winter months amount to 62,728,800 cubic feet, which, at 22.74 cents per thousand, establishes as your orator's present daily loss, by reason of the said statutory rate, the sum of \$14,264.53 per day, which loss your orator can by no possible means recover. This continuing daily loss is in addition to the deficiency of \$4,082,620.35 in your orator's earnings during the year ended October 31, 1918.

XIV. The cost of manufacturing and distributing gas has greatly increased since the said former decree, by reason of the increase in the cost of coal, enriching oil and all other materials used in the manufacture and distribution of gas, in the large advance in the wages of employees, and in the increase in taxes; and there is a certainty that there will be a very substantial increase in such cost in the year 1919.

XV. The value of money has greatly depreciated and is now far less than at the time of said former decree; and the purchasing power of a dollar at the present time is the equivalent of only about sixty cents at the time of said decree; so that an investor who might now receive ten per cent. upon his investment would not receive more than an investor in 1909 who received six per cent. upon his investment. A return or profit of six per cent. upon your orator's investment in its said plant and property is, therefore, no longer a fair, reasonable and adequate return upon such investment.

While the value of the dollar received by the stockholder has decreased as stated herein, the present cost of the property or similar property devoted to the public service has greatly increased; the result being that the owners of it, while receiving a return in a decreased purchasing power dollar are devoting a very greatly increased present cost investment to the public service.

XVI. The said rate of eighty cents per thousand cubic feet has, during the past year, practically deprived your orator of any return whatever upon the reasonable value of its property devoted to the manufacture and distribution of gas as aforesaid; and, at no time since the said rate went into effect, has it permitted your orator to earn a fair return thereon; and the said Act is in violation of Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of your orator's contract with the State of New York; and it is also in violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprives your orator of its property without due process of law and denies to it the equal protection of the laws.

XVII. Your orator is advised by counsel, and verily believes, that the said Public Service Commission of the State of New York, for the First District, has no power to permit your orator to increase the rate which it may charge for gas supplied, in excess of the maximum rate of eighty cents per thousand cubic feet prescribed by the said Act of 1903. If your orator should so attempt to increase its said rate, it would be unable to collect the same; for it is provided by the said Chapter 48 of the Consolidated Laws of the State of New York, that the charging by any gas company of any rate in excess of that permitted by law, shall be a complete defense to any action by such company against any consumer for any unpaid bill. Furthermore, it would be the duty of the defendants herein, Charles D. Newton, as Attorney General of the State of New York, and Edward Swann, as District Attorney of the County of New York, State of New York, to prosecute your orator for each such violation of law and to endeavor to enforce and collect the enormous penalties prescribed by said law; and it would be the duty of the defendants, Travis H. Whitney, Charles S. Hervey and Frederick J. H. Kracke, to cause suits in mandamus or for injunction to be brought against your orator under Section 74 of said Chapter 48 of the Consolidated Laws of New York, for the purpose of preventing your orator from so increasing its rates.

XVIII. Your orator now has more than 498,660 customers in the City and County of New York, to whom it is daily selling and distributing gas. The amount so sold and distributed during the year ending October 31, 1918, was 17,952,959,800 cubic feet. Many of said customers are financially irresponsible and only temporary residents of New York. Monthly bills for gas are rendered to such customers by your orator, and unless such bills are promptly paid, the supply of gas to delinquent customers is discontinued by your orator, as authorized by law. If your orator should make a charge to any customer, in excess of the statutory rate of eighty cents per thousand cubic feet, your orator is informed and believes that such consumer would refuse to pay such charge, upon the pretext that the making of such charge is a complete defense to your orator's entire claim against such consumer. If your orator should thereupon discontinue service to such consumers and remove the meters, your orator is advised and believes that it would be at

once subjected to a multiplicity of suits from such consumers, to compel the restoration of such meters and service, as well as to prosecutions for the fines and penalties prescribed by said Act, which prescribes a penalty of \$1,000 for each separate charge to any consumer in excess of the said statutory rate of eighty cents per thousand cubic feet. If your orator should make a charge in excess of said eighty-cent rate each month to each of its consumers, the aggregate of the penalties so incurred in one year would amount to over \$5,983,920,000, and the damage to your orator would be irreparable and absolutely destructive of all its assets, franchises and property; and a refusal or failure to observe and comply with said statute, if only for the purpose of having the same tested in good faith in a court of law, would involve a risk of absolute ruin to your orator and the entire destruction and confiscation of its property, by reason of the enormous fines for which it would be the duty of the defendants

Newton and Swann to institute suit, in accordance with the
 30 requirements of Section 1962 of the Code of Civil Procedure of the State of New York. Your orator is, therefore, without adequate remedy at law for the redress of the wrongs suffered by the enforcement of said confiscatory rate and the enforcement of said Act of 1903; and such injury to your orator is irreparable except through the intervention of a court of equity.

XIX. The value of the business and property of your orator which is involved in this suit is greatly in excess of \$3,000.

XX. To the end that your orator may have that relief which it can only obtain in a court of equity and that the defendants may each answer the premises, but not under oath or affirmation, the benefit whereof is hereby expressly waived by your orator, it hereby prays:

1. That it be adjudged and decreed that said Chapter 125 of the Laws of 1906 is illegal and void, because in contravention of Section 10 of Article I and the Fourteenth Amendment of the Constitution of the United States, as aforesaid.

2. That it be adjudged and decreed that your orator has no adequate remedy at law for the injury which will result from the further enforcement of said Act and that such injury will be irreparable.

3. That it be adjudged and decreed that your orator be granted a writ of permanent injunction, issuing out of and under the seal of this Honorable Court, against the defendants, restraining them and each of them and each of their officers, agents, servants
 31 and employees and any and every person acting under and by virtue of the authority of the said Act, from in any way enforcing or attempting to enforce the provisions of said Act of 1906 against your orator, or from bringing any actions thereunder to enforce the said penalties against your orator, or from bringing any actions in mandamus or for an injunction in any court whatsoever for the purpose of compelling compliance by your orator with said Act.

4. Your orator further prays that it have such other, further or different relief as to the Court may seem meet and the nature of the case may require.

5. Your orator further prays that your Honors grant unto your orator a writ of subpoena ad respondendum, issuing out of and under the seal of this Honorable Court, to be directed to the said defendants, commanding them and each of them on a certain day and under a certain penalty to be therein inserted, to appear before your Honors in this Honorable Court, and then and there full, true, direct and perfect answer to make to all and singular the premises, and further to stand, do, perform and abide by such further order and decree as to your Honors may seem meet.

And your orator will ever pray, etc.

CONSOLIDATED GAS COMPANY
OF NEW YORK,

By GEORGE B. CORTELYOU,
President.

SHEARMAN & STERLING,
Solicitors for Complainant, 55 Wall Street, New York.

JOHN A. GARVER,
Of Counsel.

32 UNITED STATES OF AMERICA,
*Southern District of New York,
County of New York:*

GEORGE B. CORTELYOU, being duly sworn, says that he is the president of the Consolidated Gas Company of New York, the complainant named in the foregoing bill of complaint, and has subscribed to the same, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief and that, as to those matters, he believes it to be true.

GEO. B. CORTELYOU.

Sworn to before me, January 16, 1919.

M. A. COSS,
*Commissioner of Deeds, N. Y.
County Clerk's No. 255.*

Commission expires Sept. 18, 1919.

33 *Affidavit of R. A. Carter Read in Opposition to Motion.*

District Court of the United States, Southern District of New York

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against

CHARLES D. NEWTON, as Attorney General, etc., Defendants.

STATE OF NEW YORK,
County of New York, ss:

R. A. CARTER, being duly sworn, says:

1. I am Vice-President of the Consolidated Gas Company of New York, the complainant herein.

2. No relief is sought against the City of New York in the present suit, which is brought for the sole purpose of attacking the Constitutionality of Chapter 125, of the Laws of 1906, in so far only as it attempts to limit the rate for gas sold to private consumers in the City of New York to 80¢ per thousand cubic feet.

No attack will be made by complainant in this suit upon Chapter 736 of the Laws of 1905 which prescribes a rate of 75¢ per thousand cubic feet for the City of New York and also prescribes the quality of gas to be supplied at that rate.

34 3. I am advised and believe that the City of New York has no interest in the said suit and is neither a necessary or proper party thereto.

R. A. CARTER.

Sworn to before me this 30th day of Jan., 1919.

[SEAL.] EDGAR S. MURRAY,
Notary Public, Bronx County No. 34.

Certificate filed in New York County No. 152.

Bronx County Register's No. 226.

New York County Register's No. 10163.

Commission expires March 30, 1920.

Opinion of Judge Julius M. Mayer.

District Court of the United States, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against

CHARLES D. NEWTON, as Attorney General of the State of New York;
EDWARD SWANN, as District Attorney of the County of New
York, State of New York, and TRAVIS H. WHITNEY, CHARLES S.
HERVEY and FREDERICK J. H. KRACKE, Constituting the Public
Service Commission of the State of New York, First District, De-
fendants.

William P. Burr, Corporation Counsel, and Vincent Victory, As-
sistant Corporation Counsel, of counsel, for the motion.

Shearman & Sterling, attorney- for plaintiff (E. Henry Lacombe,
John A. Carver and William L. Ransom, of counsel), all of New
York City, opposed.

Charles D. Newton, Attorney General (Robert S. Conklin, Deputy
Attorney General, of counsel);

Edward Swann, District Attorney and Assistant District Attorney
Benvesaga.

Godfrey Goldmark, of counsel for Public Service Commission,
First District.

36 *MAYER, District Judge:*

This is a motion by the Corporation Counsel on behalf of The
City of New York, for an order under Equity Rule 37, to allow The
City of New York to intervene as a party defendant in a suit brought
by plaintiff to have declared unconstitutional and void the so-called
Eighty-Cent Gas Law. The defendants in the present suit are the
Attorney General of the State of New York, the District Attorney
of the County of New York and the officials constituting the Public
Service Commission of the State of New York, First District.

An outline of the history of the litigation in respect of the statute
here concerned, and a statement of the status, as matter of law, of
the various defendants and The City of New York, are desirable
in order clearly to understand the subject matter of this motion;
for the question before the court is solely a question of law and not
one of public or administrative policy and the only power which
the court has is to determine whether or not, under Equity Rule
37, The City has the right, as matter of law, to intervene and
the court has the right to make its order accordingly.

By Chapter 736 of the Laws of 1905, all corporations or per-
sons engaged in the business of furnishing or selling illuminating
gas in The City of New York were forbidden to charge said City
a higher price therefor than 75¢ per thousand cubic feet. This

statute dealt solely with the price of gas to The City of New York in its capacity as a municipal corporation.

Under Section 3 of this statute, it was provided that "any corporation * * * violating any provision of this act shall
37 forfeit the sum of one thousand dollars for each offense to be sued for and recovered in the name and by the city of New York for its benefit."

On April 3, 1906, the New York Legislature enacted Chapter 125 of the Laws of 1906 which fixed the price of gas for all persons or corporations manufacturing, furnishing or selling the same in the Borough of Manhattan, and certain other parts of The City of New York, at 80¢ per thousand cubic feet. This latter statute has become familiarly known as the 80¢ Gas Law. Under Section 3 of this statute, it was provided that "any corporation * * * violating any provision of this act shall forfeit the sum of one thousand dollars for each offense to the people of the state"; and by Section 4 it was provided that "this act shall not apply to gas furnished or sold to the city of New York."

Under Section 1932 of the New York Code of Civil Procedure, it is provided that where a penalty is incurred to the people of the State pursuant to a provision of law "the attorney general or the district attorney of the county in which the action is triable, must bring an action to recover the * * * penalty, in a court having jurisdiction, thereof."

Chapter 737 of the Laws of 1905 established a State "Commission of Gas and Electricity" appointable by the Governor by and with the advice and consent of the State Senate. The statute conferred upon this Commission, among its other powers and duties, certain regulatory powers in respect of gas manufacture and sale, and certain powers and duties in relating to corporations or persons manufacturing or selling gas.

38 Chapter 125 of Laws of 1906 was to take effect on May 1, 1906. Prior to that date, Consolidated Gas Company brought suit in the then Circuit Court of the United States for the Southern District Court of New York, asserting that the rate under both statutes supra was confiscatory and, therefore, unconstitutional as in violation of the Fourteenth Amendment and also asserting that the difference in rate between that established for the municipality and that established for individual consumers created an unreasonable classification which amounted to a denial of the equal protection clause of the Fourteenth Amendment.

Plaintiff in that suit (which is the same plaintiff as in this suit) joined as parties defendants the public officers and official bodies upon whom was cast the duty of enforcing in one respect or another, the carrying out of both statutes, the constitutionality of which plaintiff was then attacking. The result was that, at the beginning of the suit, the defendants were the Attorney General of the State of New York, the District Attorney, the Commission of Gas and Electricity and The City of New York.

While the personnel of the public officers changed during the progress of the litigation, the only change in respect of the official

character of any defendant was that occasioned by the abolition of the Commission of Gas and Electricity and the creation of the Public Service Commissions. In due course, after the enactment of the Public Service Commissions Law, the officials constituting the Public Service Commission of the State of New York, First District, were substituted as defendants in place of those who had constituted the Commission of Gas and Electricity.

The statute was vigorously defended by the Attorney General, the Public Service Commission and The City of New York through its Corporation Counsel. The District Attorney, although a necessary party, was, for all practical purposes, a formal party and with entire propriety, in the circumstances, left the activities of the case to the other public officers and bodies.

The history of the litigation (the details of which need not be recited at length), will be found in outline in *Consolidated Gas Co. v. Mayor, et al.*, 146 Fed. Rep., 150; *Consolidated Gas Co. v. City of New York, et al.*, 157 Fed. Rep., 849; and *Willcox vs. Consolidated Gas Co.*, 212 U. S., 19. The Supreme Court of the United States in *Willcox v. Consolidated Gas Co.*, supra, held as follows:

"Upon a careful consideration of the case before us we are of opinion that the complainant has failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the legislature of the State of New York are in fact confiscatory.

It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of again presenting its case to the court. To that end we reverse the decree, with directions to dismiss the bill without prejudice, and it is so ordered."

From the foregoing it is apparent that the opportunity was left open to plaintiff to bring another suit in the future when and if it thought it could show a state of facts, which would render unconstitutional the statutes in question.

In the present suit, Chapter 736 of the Laws of 1905 is not attacked. No relief whatever is sought against The City of New York and this suit is brought for the sole purpose of attacking the constitutionality of Chapter 125 of the Laws of 1906 in so far as that statute limits the rate for gas sold to private consumers in the City of New York to 80c per thousand cubic feet. It is further stated under oath, on behalf of plaintiff, that no attack will be made by plaintiff in this suit upon Chapter 736 of the Laws of 1905.

At the outset, therefore, it will be seen that the actual situation in the present suit differs from that which obtained in the previous suit, in some important particulars: First, as above set forth, the statute fixing the price of gas to The City of New York is not now in controversy, and, secondly, the Public Service Commission, First District, which only became a party after the first suit had been in progress for some time, is the official body of local jurisdiction under existing law which is charged with safeguarding the rights and interests of those affected by the 80c. rate secured under Chapter 125 of the Laws

of 1906. The Public Service Commissions Law being Chapter 429 of the Laws of 1907, went into effect on July 1, 1907. The general plan and purpose of that statute was to create a new body of public officials upon whom was conferred new and important powers in respect of the regulation and supervision of certain classes of public utilities, some of which powers had theretofore been confided to municipal or other local authorities. The legislature provided for
 41 two public service districts, and for a Commission in each district, the first district including those counties which constitute The City of New York.

It is unnecessary to set forth in detail the important powers conferred upon these Commissions and it is sufficient in that connection to refer to Section 74 of the Public Service Commissions Law to point out the comprehensive and responsible duties of the Commissions in regard to gas corporations. That section provides as follows:

"Whenever either commission shall be of opinion that a gas corporation * * * or municipality within its jurisdiction is failing or omitting or about to fail or omit to do anything required of it by law or by order of the Commission or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the State of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction." * * *

From the foregoing it appears that the Commission in a proper case is authorized to proceed not only against gas corporations, but even against a municipality itself. On the other hand, where a
 42 municipal corporation makes complaint through its Mayor, the Commission must investigate and take such steps as may be appropriate; for it is provided in Section 71 of the Public Service Commission Law as follows:

"§71. Complaints as to quality and price of gas and electricity: Investigation by Commission: * * * Upon the complaint in writing of the mayor of a city, * * * in which a person or corporation is authorized to manufacture, sell or supply gas * * * for heat, light or power, or upon the complaint in writing of not less than one hundred customers or purchasers of such gas * * * in cities of the first * * * class * * * either as to the illuminating power, purity, pressure or price of gas * * * sold and delivered in such municipality, the proper commission shall investigate as to the cause for such complaint."

Any attempt, therefore, by any gas corporation either by way of omission or commission, to do an act contrary to law, was safeguarded by the legislature by imposing upon the Public Service Commission

of either district, as the case might be, the affirmative duties set forth in Sections 71 and 74, *supra*; and it was the legislative will that this body should be held responsible for the taking of any steps necessary to obtain redress for or protection against the violation of relevant statutes, such for instance, as the statute here in controversy.

In other words, the statutory law of New York has erected a system whereby it has charged Public Service Commissions with
 43 certain duties and responsibilities in local communities, such as municipalities which, at least prior to Chapter 737 of Laws of 1905, would have been imposed upon municipal officials. The Public Service Commissions Law was a new departure in State policy and as one of its results, the responsibility in law of defending the statute here concerned rests not upon the municipal corporation known as The City of New York, but upon a commission having jurisdiction within a defined territory co-terminous with The City of New York.

In addition to the duty of the Attorney General or the District Attorney of the County to prosecute for penalties as above pointed out, Section 68 of the Executive Law, which became effective May 2, 1913, exhibits the policy of the State of New York in desiring that its Attorney General shall resist attacks against the constitutionality of its statutes—a statutory responsibility which did not exist, when the case of Consolidated Gas Co. v. Mayer, *supra*, was begun, unless the Attorney General was made a party to a suit by reason of a statutory duty.

“§68. Attorney-General to appear in cases involving the constitutionality of an act of the legislature. Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order, directing the party desiring to raise such question to serve notice thereof on
 44 the attorney-general and that the attorney-general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such action or proceeding is pending may also make such order upon the application of any party thereto, and the court shall make such order in any such action or proceeding upon motion of the attorney-general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney-general to appear in such action or proceeding in support of the constitutionality of such statute.”

Of course, the courts referred to in Section 68 are necessarily the State court, but in view of this important State statute, the United States courts might very well regard the Attorney General as having a legal interest in a case in which the constitutionality of a State statute is involved, even though he were not charged with some specific duty under the statute. Indeed, the safeguards with which Congress has surrounded cases involving the constitutionality of State statutes, is illustrated by Section 266 of the Judicial Code by which it is provided, *inter alia*, that no interlocutory injunction

suspending or restraining the enforcement of a State statute shall be issued or granted unless due notice has been given to the Governor and the Attorney General of the state and unless a majority of three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, shall concur in granting such application. The result is that in the case now pending here, while the effect of the statute in controversy is purely local, and the Attorney General may well look to the Public Service Commission for the fullest aid
 45 and co-operation, yet the responsibility rests upon the Attorney General of being one of those public officers who must defend the constitutionality of this act. This responsibility is fully appreciated both by the Attorney General and by the Public Service Commission, First District, and they each intend vigorously to defend the enactment.

What active part the District Attorney is called upon to take is for him to determine, but there can be no question that he also will properly discharge such duty as is cast upon him.

The attitude of the Attorney General, the District Attorney and the Public Service Commission, First District, upon this motion, is, that while each, of course, is earnest in the performance of and the intention to perform his or its respective duties, they have no objection to the intervention of The City of New York as party defendant and necessarily leave the matter to the decision of the court to be disposed of as the law may require.

From the foregoing, it is apparent that every officer or public body who or which is charged by law with a duty in respect of the defense of the 80c. gas statute and of this law suit, has been made the party defendant.

The question then for the court to determine is, whether, as a matter of law, over the objection of plaintiff, the court can order that The City of New York be made a party defendant.

Preliminarily, it may be pointed out that the Supreme Court of the United States has held that "the only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them."

Re Engelhard & Sons Company, 231 U. S., 646.

46 Such was the procedure in *Wilcox v. Consolidated Gas Co.*,
supra.

The City of New York, in the previous litigation, was not regarded as a party defendant so far as Chapter 125 of the Laws of 1906 was concerned.

Consolidated Gas Co. v. Mayer, 146 Fed., Rep., 150;
Richman v. Consolidated Gas Co., 114 App. Div., 216, 224;
Buffalo Gas Co. v. City of Buffalo, 156 Fed. Rep., 370.

In the *Richman* case, *supra*, the New York Appellate Division of the First Department, held, "Of course, The City of New York does not represent the private consumers of gas." This view sustained the contention of Mr. (now Mr. Justice) Shearn, who insisted

that the restraining order of the United States Circuit Court did not run against Richman, a private consumer, because neither he nor any private consumer was a party to the suit in the United States Court.

The question then is whether the City of New York is a "proper" party defendant or has "an interest in the litigation" within the meaning of Equity Rule 37. That rule, which, with the other new Equity Rules, became effective on February 1, 1913, is as follows:

"Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may for such reasons be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

The rule is a new rule and the part as to intervention, according to Hopkins' Federal Equity Rules, was suggested by the Bar Committee of the Circuit Court of Appeals of the Eighth Circuit. Speaking generally and not technically, the rule is the same in character as rules found in the statutes of various states. (See, for instance, New York Code of Civil Procedure, sec. 447.) All but the last paragraph clearly refers to those who must or may be made a party defendant by the plaintiff.

A "complete determination" of the cause obviously refers to a determination of every issue in such manner and as to such parties as to render the decree res adjudicata.

The long settled practice in Equity is that a person cannot be made a party defendant on his own application, unless required by statute.

Toler v. East Tennessee V. & G. Ry. Co., 67 Fed. Rep., 168;
per Lurton, J., afterwards a Justice of the Supreme Court.
Coleman v. Martin, 6 Blatchf., 119;
Drake v. Goodridge, 6 Blatchf., 151;
Gregory v. Pike, 67 Fed. Rep., 837.

That The City of New York is not a necessary party defendant has already been made clear. That it is not a proper party defendant in the sense of the law, will be at once appreciated, when it is understood what is meant by a "proper" party.

The subject is carefully discussed by Street in his "Federal Equity Practice" Vol. 1, sec. 507 where he accepted the rule laid down by Judge Sanborn in *Donovan v. Campion*, 85 Fed. Rep. 72, as follows:

(1) All those whose presence is necessary to a determination of the entire controversy must be made parties to the suit; and (2) all those who have such an interest in the subject-matter of the litigation that the decree, if it should be *res adjudicata* against them, would cause them gain or loss through the direct operation and effect of the decree, may be made parties thereto, if the complainant or the Court is of the opinion that their interest in the litigation may be conveniently settled at the same time as the rights and interests of the "necessary" parties and thus the decree made to run against all those potentially affected by it.

49 Parties embraced under (1) above, the author quotes Judge Sanborn as pronouncing "necessary" parties; those under (2) above, as "proper" parties, within the concepts of a Court of equity.

In Section 509, Street deals with "proper parties," and defines them as follows:

"A proper party, as distinguished from one whose presence is necessary, to the determination of the controversy, is one who has an interest in the subject-matter of the litigation that may be conveniently settled therein."

In view of the foregoing, and to illustrate, it may very well be that a beneficiary of a trust is a proper party, while the trustee is a necessary party.

Thus, under old Rule 49, in suits concerning real estate, the trustee was a necessary party while a beneficiary might be made a defendant in the court's discretion, because a proper party.

"In such cases" the rule stated, "it shall not be necessary to make the persons beneficially interested * * * parties to the suit; but the Court may * * *, if it shall so think fit, order such persons to be made parties."

Section 255 of the Greater New York Charter which defines the duties and powers of the Corporation Counsel, does not confer upon that official rights or duties which the municipality or its departments and officers do not possess and does not make the municipality a necessary or proper party where it has no legal interest in a litigation. If plaintiff had joined The City of New York as a party defendant in this suit and such joinder had been resisted, there can be

no question that the Court would have been bound to hold that

50 The City of New York could not be made a party defendant. Referring now to the last paragraph of Rule 37, it is plain that "interest" means a legal interest. Indeed, the word "interest" is used four times in Rule 37 and must be construed *ejusdem generis*. In every instance, it is manifest that the interest must be a legal interest as those words are understood in the law. There never can be a legal interest in a suit in equity unless, as the result of the litigation, the decree affects the person or corporation claiming the interest.

An illustration of interest is *Weatherly v. Perkins*, 160 Nev. Rep.

611, where the court, under the Michigan law, allowing interventions in cases at law and equity, granted the petition to intervene of a liquor dealer, in an action brought against his surety on a bond, which rendered the surety company liable in the event that there was an illegal sale of liquor by the dealer.

Another illustration is *Central Trust Co. v. Chicago, R. I. & P. R. Co.*, 218 Fed. Rep., 336, where the intervenors were bondholders who would be directly affected by the decree.

The City of New York, however, in its corporate capacity will in no manner be affected by any decree which can be made herein. The rights of the consumers will be affected but The City of New York as a municipal corporation is not their legal representative in this suit, but their rights under the laws of the State of New York must be safeguarded by other public officials, viz: the Attorney General, the District Attorney and the Public Service Commission.

Village of South Glens Falls v. Public Service Commission for the 2nd District, Court of Appeals, decided January 18, 1919.

Re Engelhard & Sons Company, supra.

Indeed, the fact that the function of The City of New York, so far as concerns Chapter 125 of Laws of 1906, is confined to the filing of a written complaint by the Mayor, as provided in section 71 of the Public Service Commissions Law, supra, has, in principle, been fully recognized by the New York Courts.

Quinby v. Public Service Comm. 223 N. Y., 244;

Village of South Glens Falls v. Public Service Comm. for 2nd District, supra.

In all the cases cited where The City of New York or some other city or governmental subdivision was a party, it will be found that the city had a legal interest either (1) because a legislative act directly affecting it was attacked, or (2) because, by reason of some franchise or some statutory provision, the city had an interest or a duty as matter of law.

But in this case there is neither legal interest nor legal duty.

It appearing, therefore, that the court is without power and that the application is not one in respect of which the Court may exercise judicial discretion, the motion is denied.

In conclusion, it may be observed that, of course, it is the practice of this court to permit briefs to be submitted *amicus curiae*, and, no doubt, any judge of this court before whom the case shall hereafter be presented, will be glad to receive such brief or briefs, as the learned Corporation Counsel may be pleased to submit.

Settle order on 3 days' notice.

JULIUS M. MAYER,
District Judge.

February 24, 1919.

- 53 *Memorandum of Judge Julius M. Mayer Made on Settlement of Order of March 3, 1919.*

United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complain-t,
against

CHARLES D. NEWTON, as Attorney General of the State of New York,
et al., Defendants.

Memorandum.

The order herein is signed contemporaneously herewith. What I have endeavored to make clear in the order is that I have not passed upon the motion as a matter of discretion either one way or the other. If I am right, then the matter of discretion is of no consequence. If I am in error, then this court at some time hereafter, will be called upon to determine the disposition of the motion as matter of discretion.

JULIUS M. MAYER,
District Judge.

March 3, 1919.

- 54 *Order Denying Application of The City of New York to Intervene.*

At a Stated Term of the District Court of the United States for the Southern District of New York, in the Second Circuit, held at the Court Rooms in the Post Office Building, in the Borough of Manhattan, City of New York, on March 3, 1919.

Present: Hon. Julius M. Mayer, District Judge.

[In Equity. No. 15—358.]

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against

CHARLES D. NEWTON, as Attorney General of the State of New York
EDWARD SWANN, as District Attorney of the County of New York
State of New York, and TRAVIS H. WHITNEY, CHARLES S. HERVEY and FREDERICK J. H. KRACKE, Constituting the Public Service Commission of the State of New York, First District, Defendants.

This cause came on to be heard at this Term upon the petition of The City of New York, dated and verified the 29th day of January 1919, praying for an order permitting it to intervene as a party de

56-67 fendant in this cause, and was argued by counsel; and thereupon, upon consideration thereof and upon motion of Shearman and Sterling, Solicitors for the Complainant, it is

Ordered, adjudged and decreed, that the said motion to intervene be and the same hereby is denied as matter of law, and the said petition of The City of New York be and the same hereby is dismissed, the court not passing on the matter as one of discretion, because not necessary at this time, but reserving the right so to do if in error as to the law.

JULIUS M. MAYER,

U. S. District Judge.

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Assignment of Errors.

District Court of the United States, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, Constituting the Public Service Commission of the State of New York, First District, Defendants.

And now comes The City of New York and makes and files its assignment of errors as follows:

First. The District Court of the United States erred in holding that The City of New York in the previous litigation herein was not regarded as a party defendant so far as Chapter 125 of the Laws of 1906 was concerned.

Second. The District Court of the United States erred in holding that every officer or public body, who or which is charged by law with a duty in respect of the defense of the 80 per cent gas statute and of this law suit, has been made a party defendant.

69 Third. The District Court of the United States erred in holding that The City of New York is not a proper party defendant within the meaning of Equity Rule 37.

Fourth. The District Court of the United States erred in holding that The City of New York is not a necessary party within the meaning of Equity Rule 37 and to this litigation.

Fifth. The District Court of the United States erred in holding that the City of New York has no interest in this litigation within the meaning of Equity Rule 37.

Sixth. The District Court of the United States erred in denying the application of The City of New York for an order permitting it to intervene as a party defendant in this litigation.

Dated, New York, May 29, 1919.

WILLIAM P. BURR,
Corporation Counsel.

JOHN P. O'BRIEN, *Of Counsel.*

70 *Petition for Appeal, Allowance and Directions as to Bond.*

District Court of the United States, Southern District of New York.

[In Equity. No. 15--358.]

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, Constituting the Public Service Commission of the State of New York, First District, Defendants.

The City of New York, conceiving itself aggrieved by the final order or decree dated March 3, 1919, and filed and entered herein on March 3, 1919, and by the order dated May 28, 1919, and filed and entered herein on May 28, 1919, refusing to resettle said order of March 3, 1919 in the above entitled cause, doth hereby appeal from said final order or decree of March 3, 1919 and from said order or decree of May 28, 1919 refusing to resettle said order of March 3, 1919, to the Circuit Court of Appeals of the United States for the

71 Second Circuit and it prays that this appeal may be allowed and that a transcript from the record of this cause and these proceedings and the papers upon which said final order or decree and order refusing to resettle said order were made, duly authenticated, may be sent to the Circuit Court of Appeals of the United States for the Second Circuit.

Dated, New York, May 29, 1919.

WILLIAM P. BURR,
*Corporation Counsel, Municipal Building, Borough
of Manhattan, City of New York.*

And now, to wit, on May 29, 1919, it is

Ordered that the appeal prayed for in the petition of The City of New York be allowed.

Dated, New York, May 29, 1919.

JULIUS M. MAYER,
U. S. D. J.

Bond to cover costs of appeal will be dispensed with in this case.

JULIUS M. MAYER,
U. S. D. J.

I think this order is not appealable but I allow it so the question can be raised.

J. M. M.,
D. J.

Citation on Appeal.

District Court of the United States, Southern District of New York.

[In Equity. No. 15—358.]

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against

CHARLES D. NEWTON, as Attorney General of the State of New York;
EDWARD SWANN, as District Attorney of the County of New York,
State of New York, and LEWIS NIXON, Constituting the Public
Service Commission of the State of New York, First District, De-
fendants.

UNITED STATES OF AMERICA, ss.:

To

Consolidated Gas Company of New York;

Charles D. Newton, as Attorney General of the State of New York;
Edward Swann, as District Attorney of the County of New York,
State of New York, and

Lewis Nixon, constituting the Public Service Commission of the
State of New York, First District:

You are hereby cited and admonished to be and appear at
the Circuit Court of Appeals of the United States for the Sec-
ond Circuit to be held on the 27th day of June, 1919, pur-
suant to an appeal filed in the Clerk's Office of the District Court
of the United States for the Southern District of New York, wherein
the City of New York is appellant and Consolidated Gas Company
of New York, Charles D. Newton, as Attorney General of the State
of New York, Edward Swann, as District Attorney of the County
of New York, State of New York, and Lewis Nixon, constituting
the Public Service Commission of the State of New York, First Dis-
trict, are respondents, to show cause, if any there be, why the final
order or decree in said notice of appeal mentioned, and the order
refusing to resettle said final order or decree should not be corrected
and speedy justice should not be done to the parties in that behalf.

Witness my hand and the seal of the District Court of the United
States for the Southern District of New York, this twenty-ninth day
of May, in the year of Our Lord, one thousand nine hundred and
nineteen.

JULIUS M. MAYER,
*Judge of the District Court of the United States
for the Southern District of New York.*

- 74 United States Circuit Court of Appeals for the Second Circuit,
October Term, 1918.

No. 240.

Argued June 19, 1919. Decided June 27, 1919.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Appellee,
against

CHARLES D. NEWTON, as Attorney General of the State of New York;
EDWARD SWANN, as District Attorney of the County of New York,
State of New York, and TRAVIS H. WHITNEY, CHARLES S. HER-
VEY, and FREDERICK J. H. KRACKE, Constituting the Public Ser-
vice Commission of the State of New York, First District, Defend-
ants-Appellees; THE CITY OF NEW YORK, Appellant.

Appeal from the District Court of the United States for the Southern
District of New York.

Before Ward, Rogers and Hough, Circuit Judges.

Appeal from an Order of the District Court Denying Application of
the State of New York for Leave to Intervene as a Party De-
fendant.

- 75 William P. Burr, Corporation Counsel, for Appellant.
William P. Burr, Terence Farley, Vincent Victory and
Judson Hyatt, of Counsel.
Shearman & Sterling, for Appellee.
E. Henry Lacombe, John A. Garver and William L. Ransom, of
Counsel.

Per Curiam:

Order affirmed.

- 76 At a Stated Term of the United States Circuit Court of Ap-
peals, in and for the Second Circuit, held at the Court
Rooms in the Post Office Building in the City of New York, on
the 7th day of July, one thousand nine hundred and nineteen.

Present:

Hon. Henry G. Ward,
Hon. Henry Wade Rogers,
Hon. Charles M. Hough,
Circuit Judges.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

v.

CHARLES D. NEWTON, as Attorney General of the State of New York,
etc., et al., Defendants; CITY OF NEW YORK, Appellant.

Appeal from the District Court of the United States for the Southern
District of New York.

This cause came on to be heard on the transcript of record from the
District Court of the United States, for the Southern District of New
York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and
decreed that the order of said District Court be and it hereby is af-
firmed with costs.

It is further ordered that a Mandate issue to the said District Court
in accordance with this decree.

H. G. W.

H. W. R.

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Endorsed:

United States Circuit Court of Appeals, Second Circuit.

Cons. Gas. Co.

v.

C. D. Newton and ano.

Order for Mandate.

United States Circuit Court of Appeals, Second Circuit. Filed Jul.
18, 1919. William Parkin, Clerk.

78 United States Circuit Court of Appeals for the Second District.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Appellee,
against

CHARLES D. NEWTON, as Attorney General of the State of New York;
EDWARD SWANN, as District Attorney of the County of New York,
State of New York, and LEWIS NIXON, Constituting the Public
Service Commission of the State of New York, First District, De-
fendants-Appellees; THE CITY OF NEW YORK, Petitioner and Ap-
pellant.

The above-named petitioner, The City of New York, conceiving
itself aggrieved by the order of the Circuit Court of Appeals, Second
Circuit, filed and entered herein on July 18th 1919, affirming the

order of the District Court for the Southern District of New York, dated and entered on March 3, 1919, in the above-entitled action, and directing the issue of the mandate therein, doth hereby appeal from said order to the Supreme Court of the United States, and it prays that this, its appeal, may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

WILLIAM P. BURR,
*Corporation Counsel of the City of New York,
and Solicitor for The City of New York.*

Office & Post Office Address: Municipal Building, Borough of Manhattan, New York City.

New York, September 23rd, 1919.

And now, to wit: It is ordered that the appeal be allowed as prayed for.

H. G. WARD,
Judge of the United States Circuit Court of Appeals.

Bond is hereby fixed at \$250 for costs.

H. G. WARD,
J. U. S. C., C. A.

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(Endorsed:)

County Clerk's Index Number, — year 191 —.

United States Circuit Court of Appeals for the Second District.

Consolidated Gas Company of New York, Complainant-Appellee,

vs.

CHARLES D. NEWTON, as Attorney General of the State of New York;
Edward Swann, as District Attorney of the County of New York,
State of New York, and Lewis Nixon, Constituting the Public Service
Commission of the State of New York, First District, Defendants-Appellees;
The City of New York, Petitioner and Appellant.

Petition, Appeal & Allowance.

WILLIAM P. BURR,
Corporation Counsel.

Municipal Building, Borough of Manhattan, New York City.

United States Circuit Court of Appeals, Second Circuit. Filed
Sept. 23, 1919. William Parkin, Clerk.

Circuit Court of Appeals for the Second Circuit.

CONSOLIDATED GAS COMPANY OF NEW YORK, Plaintiff-Appellee,
against

CHARLES D. NEWTON, as Attorney General of the State of New York;
Edward Swann, as District Attorney of the County of New York,
State of New York, and Lewis Nixon, constituting the Public Serv-
ice Commission of the State of New York, First District, Defend-
ants-Appellees; The City of New York, Appellant.

And now comes The City of New York and makes and files its
assignment of errors as follows:

First. The Circuit Court of Appeals of the United States for the
Second Circuit erred in confirming the order of March 3, 1919 of
the District Court of the United States for the Southern District of
New York and in thereby denying the application of The City of New
York for an order permitting it to intervene as a party defendant in
this litigation and also in refusing to reverse said order of March 3,
1919 of the District Court of the United States for the Southern Dis-
trict of New York filed and entered herein on March 3, 1919.

Second. The Circuit Court of Appeals of the United States for the
Second Circuit erred in confirming said order of the District Court and
in thereby holding that The City of New York in the previous liti-
gation herein was not regarded as a party defendant so far as Chapter
125 of the Laws of 1906 was concerned.

81 Third. The Circuit Court of Appeals of the United States
for the Second Circuit erred in confirming said order of the
District Court of the United States for the Southern District of New
York and in thereby holding that every officer or public body who
or which is charged by law with a duty in respect of the defense of the
80 cent gas statute and of this law suit, has been made a party de-
fendant.

Fourth. The Circuit Court of Appeals of the United States for
the Second Circuit erred in confirming said order of the District
Court of the United States for the Southern District of New York and
in thereby holding that The City of New York is not a proper party
defendant within the meaning of Equity Rule 37.

Fifth. The Circuit Court of Appeals of the United States for the
Second Circuit erred in confirming said order of the District Court of
the United States for the Southern District of New York and in
thereby holding that The City of New York is not a necessary party
within the meaning of Equity Rule 37 and to this litigation.

Sixth. The Circuit Court of Appeals of the United States for the
Second Circuit erred in confirming said order of the District Court
of the United States for the Southern District of New York and in

thereby holding that The City of New York has no interest in this litigation within the meaning of said Equity Rule 37.

Dated, New York, September 22, 1919.

WILLIAM P. BURR,
Corporation Counsel, Solicitor for The City of New York.

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(Endorsed:)

County Clerk's Index Number, — Year 191—.

Circuit Court of Appeals for the Second Circuit.

Consolidated Gas Company of New York, Plaintiff-Appellee,
against

Charles D. Newton, as Attorney General of the State of New York
et al., Defendants-Appellees; The City of New York, Appellant.

Assignment of Errors.

William P. Burr, Corporation Counsel, Municipal Building, Borough
of Manhattan, New York City.

United States Circuit Court of Appeals, Second Circuit. Filed Sep.
23, 1919. William Parkin, Clerk.

83 United States Circuit Court of Appeals for the Second Circuit.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Appellee,
against

CHARLES D. NEWTON, as Attorney General of the State of New York;
Edward Swann, as District Attorney of the County of New York,
State of New York, and Lewis Nixon, constituting the Public Service
Commission of the State of New York, First District, Defendants-Appellees; The City of New York, Petitioner and Appellant.

Service of a copy of the annexed original citation dated September
23, 1919, and of copies of the assignment of errors, petition, appeal
and allowance in the above entitled matter are hereby admitted.

Dated, September 24, 1919.

SHEARMAN & STERLING,
*Solicitors for Respondent, Consolidated Gas
Company of New York, 56 Wall Street,
Borough of Manhattan, City of New York.*

CHARLES D. NEWTON,
*Attorney General of the State of New
York, 57 Chambers Street, Borough
of Manhattan, City of New York.*

EDWARD SWANN,
District Attorney for the County of New York.

TERENCE FARLEY,
*Solicitor for Respondent, Lewis Nixon,
Constituting the Public Service Com-
mission for the First District.*

84

(Endorsed:)

County Clerk's Index Number, — Year, 191—.

United States Circuit Court of Appeals for the Second Circuit.

Consolidated Gas Company of New York, Complainant-Appellee,

against

Charles D. Newton, etc., et al., Defendants-Appellees; The City of New York, Petitioner and Appellant.

Admission of Service of Citation, etc.

William P. Burr, Corporation Counsel, Municipal Building, Borough of Manhattan, New York City.

United States Circuit Court of Appeals, Second Circuit. Filed Sept. 27, 1919. William Parkin, Clerk.

85 United States Circuit Court of Appeals for the Second District.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Appellee,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, Constituting the Public Service Commission of the State of New York, First District, Defendants-Appellees; THE CITY OF NEW YORK, Petitioner-Appellant.

Know All Men by These Presents:

That the City of New York, as Principal, and the United States Fidelity and Guaranty Company, having an office and usual place of business at 47 Cedar Street, in the City, County and State of New York, as Surety, are held and firmly bound unto the above named Consolidated Gas Company of New York, in the sum of Two Hundred and Fifty Dollars (\$250.00), to be paid to said Consolidated Gas Company of New York for the payment of which, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents:

Sealed, with our seals and dated the 30th day of September, in the year One Thousand, nine hundred and nineteen.

Whereas, the above named, The City of New York, has prosecuted an appeal to the Supreme Court of the United States to reverse the order rendered in the above entitled suit by the judgment of the

United States Circuit Court of Appeals for the Second Circuit.

86 Now, Therefore, the condition of this obligation is such that of the above named, The City of New York, shall prosecute said appeal to effect and answer all damages and costs of this appeal, if it fail to make said appeal good, then this obligation shall

be void, otherwise the same shall be and remain in full force and effect.

THE CITY OF NEW YORK,
By GEO. P. NICHOLSON,
*Acting Corporation Counsel of
The City of New York.*

UNITED STATES FIDELITY AND
GUARANTY COMPANY,
By S. FRANK HEDGES,
Attorney-in-fact.

Attest:

[SEAL.]
ADOLPHUS A. JACKSON,
Attorney-in-fact.

STATE OF NEW YORK,
City and County of New York, ss:

On the 1st day of October, 1919, before me personally came George P. Nicholson, acting Corporation Counsel of The City of New York, Acting head of the Law Department, one of the departments of The City of New York, to me known, and known to me to be the individual described in and who executed the foregoing instrument, and who duly acknowledged to me that he executed the same.

MATTHEW F. DAFFY,
Notary Public, Kings Co. No. 1.

Kings Co. Register's No. 1005.
New York Co. Clerk's No. 5.
New York Co. Register's No. 1125.
Bronx Co. Clerk's No. 9.
Bronx Co. Register's No. 2118.
Queens Co. Clerk's No. 1201.
Term Expires March 30, 1921.

87 *Affidavit, Acknowledgment and Justification by the United States Fidelity and Guaranty Company.*

[Vignette.]

STATE OF NEW YORK,
County of New York, ss:

Before me personally came S. Frank Hedges, known to me to be an Attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of The City of New York as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the said Attorney-in-fact of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has

complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of The City of New York is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as such Attorney-in-fact of said Company; and that he is acquainted with Adolphus A. Jackson, and knows him to be Attorney-in-fact of said Company; and that the signature of said Adolphus A. Jackson subscribed to said bond is the genuine handwriting of said Adolphus A. Jackson and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars (\$2,000,000.00).

S. FRANK HEDGES.

Sworn to, acknowledged before me, and subscribed in my presence, this 30th day of September, 1919.

AUGUSTUS WALLAUER,
Notary Public, New York County.

Notary Public, Queens County No. 1983.
Certificate filed in New York County No. 363 Register's No. 1370.
Richmond, Westchester, Nassau, Putnam, Orange, Suffolk & Rockland Counties.
Term expires March 30, 1921.

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[Endorsed:]

County Clerk's Index Number, — Year 191-.

United States Circuit Court of the U. S. for the Second Dist.

Consolidated Gas Co. of New York, Complainant-Appellee,
against

Charles D. Newton, et al. and Lewis Nixon, Constituting the Public Service Com. for the First District, Defendants-Appellees; The City of New York, Petitioner-Appellant.

Bond on Appeal to the Supreme Court of the U. S.

William P. Burr, Corporation Counsel, Municipal Building, Borough of Manhattan, New York City.

Approved this 1st day of October, 1919, as a bond for costs.

H. G. Wood, Judge of U. S. Circuit Court of Appeals.

United States Circuit Court of Appeals, Second Circuit. Filed Oct. 1, 1919. William Parkin, Clerk.

89 United States Circuit Court of Appeals for the Second District.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Appellee,
against

CHARLES D. NEWTON, as Attorney General of the State of New York;
Edward Swann, as District Attorney of the County of New York,
State of New York, and Lewis Nixon, Constituting the Public
Service Commission of the State of New York, First District, De-
fendants-Appellees; The City of New York, Petitioner and Ap-
pellant.

It is hereby stipulated by the attorneys for the parties to the
above entitled appeal that the following papers are the portions of
the record which shall constitute the transcript of record on appeal
herein, to wit:

- (1) The order to show cause.
- (2) The petition of The City of New York.
- (3) The bill of complaint.
- (4) The affidavit of R. A. Carter read in opposition to motion.
- (5) The opinion of Judge Julius M. Mayer.
- (6) The memorandum of Judge Julius M. Mayer made on settle-
ment of order of March 3, 1919.
- (7) The order denying the application of The City of New York
to intervene.
- (8) The assignment of errors on the appeal to the Circuit Court
of Appeals.
- (9) The petition for appeal to the Circuit Court of Appeals.
- (10) The allowance and direction as to bond on the appeal to the
Circuit Court of Appeals.
- 90 (11) The citation on appeal to the Circuit Court of Ap-
peals.
- (12) Transcript of the record of the Circuit Court of Appeals
showing the affirmance of the order of March 3, 1919, without
opinion by said Court of Appeals.
- (13) The order for mandate.
- (14) Assignment of errors filed with the petition for an allow-
ance of an appeal to the Supreme Court of the United States.
- (15) The petition, appeal and allowance thereof to the Supreme
Court of the United States.

(16) Citation on appeal to the Supreme Court of the United States.

Dated, New York, September 24, 1919.

WILLIAM P. BURR,
*Corporation Counsel and Solicitor
for the City of New York.*

SHEARMAN & STIRLING,
*Attorneys for the Consolidated
Gas Company of New York.*

TERENCE FARLEY,
*Attorney for Lewis Nixon, Constituting
the Public Service Commission of the
State of New York for the First District.*

CHARLES D. NEWTON,
Attorney General, State of New York.

EDWARD SWANN,
District Attorney for the County of New York.

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[Endorsed.]

County Clerk's Index Number, Year 191-.

United States Circuit Court of Appeals for the Second District.

Consolidated Gas Company of New York, Complainant-Appellee,
against

Charles D. Newton, as Attorney General of the State of New York,
etc., Defendant-Appellees, The City of New York, Petitioner and
Appellant.

Stipulation as to the Transcript of Records.

William P. Burr, Corporation Counsel, Municipal Building, Borough
of Manhattan, New York City.

United States Circuit Court of Appeals, Second Circuit. Filed
Sept. 27, 1919. William Parkin, Clerk.

92 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 91 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Consolidated Gas Company of New York against Charles D. Newton, as Att'y. Gen'l, etc., et al., as agreed upon by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern Dis-

trict of New York, in the Second Circuit, this 1st day of October in the year of our Lord One Thousand Nine Hundred and Nineteen and of the Independence of the said United States the One Hundred and Forty-fourth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

93 UNITED STATES OF AMERICA, ss:

To Shearman & Sterling, Esqs., solicitors for complainant, No. 55 Wall Street, Borough of Manhattan, The City of New York; Terence Farley, Esq., counsel to Lewis Nixon, constituting the Public Service Commission for the First District, No. 49 Lafayette Street, Borough of Manhattan, The City of New York; Charles D. Newton, Esq., Attorney General of the State of New York, No. 51 Chambers Street, Borough of Manhattan, The City of New York; Edward Swann, Esq., District Attorney of the County of New York, State of New York, Criminal Court Building, Centre Street, Borough of Manhattan, The City of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the 21st day of October, 1919, pursuant to an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein The City of New York is appellant, and the Consolidated Gas Company of New York, Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, the Attorney General of the State of New York, and the District Attorney of the County of New York, are appellees, to show cause, if any there be, why the final order or decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, the Hon. Edward Douglass White, Chief Justice of the U. S. Supreme Court, this 23d day of September, in the year one thousand nine hundred and nineteen.

H. G. WARD,
*Judge of the United States
Circuit Court of Appeals.*

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[Endorsed:]

United States Circuit Court of Appeals for the Second Circuit.
Consolidated Gas Company of New York, Complainant-Appellee,

vs.

Charles D. Newton et al., Constituting the Public Service Commission of the State of New York, First District, Defendants-Appellees; The City of New York, Petitioner and Appellant.

Original.

Citation on Appeal.

William P. Burr, Corporation Counsel, Office & P. O. Address, Municipal Building, Borough of Manhattan, New York City.

Served by J. Bailey. Date, 9/24/19.

Filed Sept. 27, 1919. William Parkin, Clerk.

[Stamped:] District Attorney's Office, received Sep. 24, 1919.

Endorsed on cover: File No. 27,321. U. S. Circuit Court Appeals, 2d Circuit. Term No. 566. The City of New York, appellant, vs. The Consolidated Gas Company of New York et al. Filed October 10th, 1919. File No. 27,321.

(562)



APR 19 1920

JAMES D. MAHER,
CLERK

No. 566

IN THE
Supreme Court of the United States.

OCTOBER TERM—1919.

CONSOLIDATED GAS COMPANY,
Complainant-Appellee,

vs.

CHARLES D. NEWTON, as Attorney General of the State of
New York; EDWARD SWANN, as District Attorney of
the County of New York, State of New York, and
LEWIS NIXON, constituting the Public Service Com-
mission of the State of New York, First District
Defendants,

THE CITY OF NEW YORK,
Appellant.

**BRIEF ON APPEAL FROM ORDER DENYING
APPLICATION OF CITY OF NEW YORK TO
INTERVENE AS PARTY DEFENDANT.**

CHARLES D. NEWTON,
*Attorney General of the
State of New York,
State Capitol,
Albany, N. Y.*

WILBER W. CHAMBERS,
*Solicitor for Defendant Newton
as Attorney General,
Albany, N. Y.*

IN THE
Supreme Court of the United States.

CONSOLIDATED GAS COMPANY,
Complainant-Appellee,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, constituting the Public Service Commission of the State of New York, First District,

Defendants,

THE CITY OF NEW YORK,
Appellant.

**BRIEF OF DEFENDANT-APPELLEE
CHARLES D. NEWTON, AS ATTORNEY-
GENERAL.**

The application of the appellant, The City of New York, for an order herein, joining the said City as a party defendant was supported by the

undersigned upon the argument in the District Court on the appeal to the Circuit Court of Appeals and he remains of the opinion that such relief should be granted.

POINT I.

The City of New York is an interested party in the litigation.

The interest involved is primarily a local one. Because of the broad, sweeping provisions of the New York Statute (Code of Civil Procedure, Sec. 1962) (Sec. 68 of the Executive Law), in the event of a violation of the Law by the complainant, it would become the duty of the Attorney-General to bring action to recover the prescribed penalty. The People of the State at large, however, have no interest in the litigation other than the general interest they have in compelling observance of all laws by corporations to which franchises have been granted.

The complainant exercises its franchise solely within the City of New York. If the complainant be successful in maintaining this action, only those persons who consume gas within the City of New York will be affected thereby. The Statute fixing the price of gas at Eighty Cents within the City of New York was enacted by the State Legislature at the request of the people of the locality affected, as a Local Bill, and as such received the approval of the Mayor of the City of New York.

The nullification of this Statute would have a far reaching influence upon the City. An increase in the price of gas would result in an increase in the expense of operating every residence, every office building and factory, affect the value of real estate and hence ultimately affect local taxation.

Strictly speaking, what the complainant seeks in this action is to restrain the defendants from enforcing the law. It is the contention of complainant that since the City has no power of enforcement it is an intruder, without warrant, in the controversy. The Court, cannot, however, shut its eyes to the somewhat broader aspects of the situation. The City as a municipal corporation has its origin in the desire and purpose of the citizens residing within it to act collectively for their own general welfare. The service furnished by the complainant is of so general a character that practically every citizen is affected thereby. The State law so far recognizes the need of an agency through which the citizens may act collectively, for their protection in gas rate matters, that it provides for the filing of a complaint relative to such rates by the Mayor of the municipal corporation. It is surely not illogical to carry the reasoning a bit further and to determine that if the citizens desire to defend their interests by means of the collective agency through which they are accustomed to act, they should be permitted to do so.

No State agency can command the degree of confidence on the part of the citizens that a local agency can, when such local agency is wholly within the control of the citizens.

On February 14, 1920, after the record in this case was filed, Mr. Justice Greenbaum in the Supreme Court of New York in the case of Jamaica Gas Light Co. vs. Nixon *et al.* held, upon an application of the City of New York to intervene in a case similar to that at bar attacking the constitutionality of the same law as that attacked in this case, that the City of New York is a necessary and proper party in a suit of this kind, and that pursuant to Section 255 of the Greater New York Charter the Corporation Counsel has a specific legal duty to defend the "right and interests * * * of the People of the City of New York."

This decision, while not published in the reports, will be found in the New York Law Journal of February 14, 1920.

POINT II.

Equity Rule 37 confers discretion on the Court to allow The City of New York to intervene.

Equity Rule 37 was obviously intended to grant to the Court broader powers than had theretofore been exercised by the Court in matters of intervention. It should be interpreted in a liberal spirit.

Reading the entire rule with all of its subdivisions its clear intent seems to be to confer power on the Court in its discretion and in order that the ends of justice may be attained, to permit the intervention of "All persons having an interest in the

subject of the action" and "Anyone claiming an interest in the litigation."

Dated New York, April 7th, 1920.

Respectfully submitted,

CHARLES D. NEWTON,
Defendant,
Attorney-General of the
State of New York.

WILBER W. CHAMBERS,
Solicitor for Defendant Newton as
Attorney General,
Capitol, Albany, N. Y.

ROBERT S. CONKLIN,
Deputy Attorney-General,
Of Counsel.



No. 566

New York Supreme Court,

NEW YORK COUNTY.

THE JAMAICA GAS LIGHT COMPANY,
Plaintiff,

against

LEWIS NIXON, constituting the Public Service Commission of the State of New York for the First District; DENIS O'LEARY, as District Attorney of the County of Queens; CHARLES D. NEWTON, as Attorney General of the State of New York; and THE CITY OF NEW YORK,

Defendants.

**OPINION OF MR. JUSTICE SAMUEL GREENBAUM
RENDERED IN THE ABOVE ENTITLED ACTION
ON FEBRUARY 13, 1920.**

JOHN P. O'BRIEN,
*Corporation Counsel,
Solicitor for The City
of New York,
Municipal Building,
Borough of Manhattan,
City of New York,
State of New York.*

Submitted on argument of Consolidated Gas Company of
New York vs. Charles D. Newton and others
April 19th, 1920.



Opinion of Mr. Justice Samuel Greenbaum, rendered in the Supreme Court of the State of New York, taken from New York Law Journal of February 14th, 1920.

Decided February 13th, 1920.

“Jamaica Gas Light Co. vs. Nixon *et al.*, &c.—The City of New York moves to intervene as a party defendant in the above entitled action. The action is brought to test the constitutionality as to the plaintiff of chapter 125 of the Laws of 1906, wherein it is provided *inter alia* that a corporation engaged in the business of selling or furnishing illuminating gas in the Fourth Ward of the Borough of Queens, in the City of New York, shall not charge or receive a sum in excess of \$1 per 1,000 cubic feet of gas. The plaintiff, in opposing this motion, relies upon the opinion of Mayer, J., filed February 24, 1919, in Cons. Gas Co. of N. Y. v. Chas. D. Newton, as Attorney-General of the State of New York *et al.*, in a suit pending in the United States District Court for the Southern District of New York, in which a similar motion for intervention on the part of the City of New York was denied. A study of that opinion discloses that the court reached its conclusion upon the construction which it gave to the Federal Equity Rule 37, which treats of parties

in equity suits. The learned Court there held that the City of New York did not have such a "legal interest" as was contemplated under Rule 37, and therefore was not entitled to intervene. This Court, however, is obliged to determine the right of intervention under the provisions of the Code of Civil Procedure. It thus becomes necessary to determine the effect to be given to the relevant section of the Code affecting the rights of the parties upon this motion. Section 452 provides: "The Court may determine the controversy as between parties before it, where it can do so without prejudice to the rights of others or by saving their rights, but where a complete determination of the controversy cannot be had without the presence of other parties the Court must direct them to be brought in. And where a person not a party to the action has an interest in the subject matter thereof * * * and makes application to the Court to be made a party, it must direct him to be brought in by the proper amendment." The vital question therefore is, Has the City of New York such an interest in the subject of this action as to come within section 452 of the Code? At the outset it is proper to note that the complaint in this action differs from that in the Consolidated Gas Company case (*supra*) in two respects: First, in the instant case it is alleged that the plaintiff "owns and possesses a perpetual and indefeasible interest in the lands constituting the streets and highways of said former village, in which its mains are laid." The City of New York is the trustee of the people in respect of the streets and highways within its territorial limits, and is also the owner in fee simple absolute of many streets,

highways and avenues of the city. It also alleges that chapter 125 of the Laws of 1906 "impairs the obligation of the plaintiff's contracts with the City of New York and the municipality." No such allegations appear in the bill of complaint in the Consolidated Gas Company case. It may be that an issue may be tendered in this action respecting plaintiff's contracts with the City of New York, which makes it proper to permit the municipality to intervene. In this connection it may also be observed that the concluding paragraphs of the opinion of the learned Court in the Consolidated Gas Company case (*supra*) stated that in all the cases cited by the defendants the City of New York had a legal interest either "because a legislative act directly affecting it was attacked, or because, by reason of some franchise or some statutory provision the city had an interest or duty as matter of law." This would seem to indicate that the attention of the Court was not called either to the fact that the legislative act here assailed was one that affected the City of New York, or to the various statutory provisions to which reference will presently be made. Before chapter 125 of the Laws of 1906, which is the legislative act herein attacked, became a law, it was referred to the City of New York for acceptance or rejection, in accordance with the mandatory provisions of article 12, paragraph 2, of the state constitution, which imposes the duty upon the state Legislature to refer all bills "affecting property, affairs or government of cities" to it for acceptance or rejection. It thus appears that chapter 125 of the Laws of 1906, although applicable solely to private consumers in the City of

New York, was nevertheless referred to the city, for the ostensible reason that it was a bill which related to "affairs" of the city within the meaning of the state constitution, and that after its acceptance by the city it became a law. By chapter 429 of the Laws of 1907 the Legislature created a public service commission, and invested it with the powers of the commission of gas and electricity, which had been created by chapter 737 of the Laws of 1905. Chapter 604, Laws of 1916, which amended chapter 125 of the Laws of 1906, also became a law only after its acceptance by the City of New York, thus again evidencing the fact that the City of New York was recognized by the Legislature as having an interest in the matter of gas rates affecting consumers in the City of New York and that notwithstanding there then existed a Public Service Commission, which was charged with active duties which included matters pertaining to the manufacture and distribution of gas. It should also be borne in mind that the determination of the constitutional question presented in this action necessarily involves findings of fact touching the reasonable cost of production and distribution of gas. If it be found that the cost of manufacturing and distributing the gas is more than 75 cents per 1,000 cubic feet, which is the rate fixed by chapter 736 of the Laws of 1905 for gas furnished to the city, the latter might be greatly embarrassed in any subsequent action assailing the constitutionality of that law, even though a decree may not be *res adjudicata* as to it in the present action. As bearing upon the question under discussion consideration should be given to the provisions of what is known

as the Home Rule Law, being chapter 247 of the Laws of 1913. It is there provided, among other things, that the city has power to "maintain order, enforce laws, protect property and preserve and care for the safety, health, comfort and general welfare of the inhabitants of the city and visitors thereto." Section 21 of the Home Rule Law defines the general meaning of the term "general welfare" in that act as including "health, safety, comfort and convenience." The comfort and convenience of the people of the City of New York would be seriously affected if the heating and illuminating qualities of the gas are not up to the legal standard. In section 469 of the Greater New York Charter power is conferred upon the commissioner of water supply, gas and electricity to inspect and test "gas and electricity used for light, heat and power purposes." It appears in the moving affidavits that the city maintains at considerable expense stations for testing the quality and pressure of gas furnished throughout the city to the private consumer for the purpose of determining whether the consumer is obtaining the standard of gas prescribed by law. Consideration should also be taken of the provisions of section 71 of the Public Service Commissions Law, which expressly authorizes the commission to receive and consider the complaint of the Mayor of the City of New York as to the price, pressure, purity and quality of the illuminating gas furnished to the people of the city. In this connection we may quote from *International Railway Company vs. Rann* (224 N. Y., 83): "A municipal corporation consists, however, of both territory and inhabitants. As a legal conception the corporation is an entity

distinct from its inhabitants, but it remains a local community, a body of persons, the sum total of its inhabitants and the proper custodian and guardian of their collective rights." We also find in section 255 of the Greater New York Charter, as amended by chapter 466 of the Laws of 1901 and chapter 602 of the Laws of 1917, that "the corporation counsel, except as otherwise herein provided, shall have the right to . . . defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or any part or portion thereof or of the people thereof" We thus find a specific legal duty devolving upon the corporation counsel to defend the "rights and interests . . . of the people" of the City of New York. It cannot be gainsaid that the people of New York have a vital collective interest in the determination of the issues involved in this action. It is claimed that the Public Service Commission is the legal defender of the rights of the people with respect to such a question as is involved in this action. As a matter of fact we also find that the district attorney as well as the attorney-general of the state have special duties to perform in enforcing the laws regulating the price and quality of gas. The Public Service Commission is a state body, and is not exclusively or specially vested with the duty of safeguarding the interests of the people of the City of New York. The obligations placed upon the Public Service Commission are not inconsistent with those which devolve upon the City of New York as custodian of the rights of the people entitling it to join in the defense of this action. It seems to the Court that in view of all the considerations above set

forth, the City of New York has such an interest in litigating the questions involved in this action as fairly to bring it within the provision of section 452 of the Code so as to constitute it a proper, if not indeed a necessary, party thereto, and to justify the exercise of the Court's discretion in granting the motion."